

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in October 2016

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Selection; Nonexempt Classified Employee; Affirmative Action
<u>CASE STYLE:</u>	<u>Blackshire v. Mountwest Community and Technical College</u> DOCKET NO. 2016-0110-MCTC (10/11/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievant as entitled to the nonexempt classified position when he was the only qualified current employee who applied for the position.
<u>SUMMARY:</u>	Grievant is employed by Respondent as a Maintenance Worker II and applied for the Coordinator – Student Support Services position. Both positions are nonexempt classified positions. West Virginia Code requires Respondent to hire a current employee who meets the minimum qualifications for a nonexempt classified position before hiring a new person, unless the hiring was affected by mandates in its affirmative action plan. Grievant, who holds a Bachelor of Science in Health Service Administration, was the only qualified internal applicant for the position, but Respondent instead hired a minority female external applicant. As there was no underutilization of females or minorities in the job group in which the position was categorized, there was no mandate in Respondent's affirmative action that would prevent the application of the statutory requirement to fill the position with a qualified internal applicant. Grievant proved, as the only qualified internal applicant, he was entitled to the position. Accordingly, the grievance is granted.

<u>KEYWORDS:</u>	Default; Level One; Time Limits; Lack of Cooperation
<u>CASE STYLE:</u>	<u>Riedel v. West Virginia University</u> DOCKET NO. 2015-1774-CONSDEF (10/13/2016)
<u>PRIMARY ISSUES:</u>	Whether default occurred at Level One.
<u>SUMMARY:</u>	Grievant filed this action challenging his ratings by the chairman of the Department of Biochemistry in his most recent annual review. Grievant disagrees with the good rating provided by his chairman in the areas of teaching and service. Subsequently, Grievant filed numerous grievances disputing the actions of his Department Chair. Grievant claims default occurred at Level One. The record of this case demonstrated that default did not occur as the facts demonstrate that any delay in scheduling a Level One hearing was the result of justified delay not caused by negligence or intent to delay the grievance process.

KEYWORDS:

Job Duties; Additional Employment; Assigned Duties; PIQ; Arbitrary and Capricious; Mutual Agreement; Job-Related

CASE STYLE:

Lynch v. Concord University

DOCKET NO. 2016-0478-CU (10/13/2016)

PRIMARY ISSUES:

Whether Grievant proved his claim that Respondent improperly assigned him duties that were not included in his job description.

SUMMARY:

Grievant is employed as a Trade Specialist II Electrician by Respondent. On a particular day, Grievant was assigned to clean the dead insects out of the light fixture covers for the lights in the loading dock area behind the campus kitchen facilities. Grievant completed the task asked of him in one hour during his regular work hours. Grievant filed this grievance afterward asserting that the assignment was not part of his job duties and responsibilities, and was unrelated to his job as an electrician. Grievant further asserted that such constituted additional employment for which a mutual agreement for additional employment was required. Respondent denies Grievant's claims and argues that the assignment was job-related. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Salary; Administrative Pay Scale; Job Duties and Responsibilities; Timelines; Continuing Practice; Discrimination; Favoritism; Similarly Situated

CASE STYLE: Anderson v. Hancock County Board of Education
DOCKET NO. 2015-1581-HanED (10/20/2016)

PRIMARY ISSUES: Whether Grievant is entitled to be paid from the administrative pay scale.

SUMMARY: Grievant is the Coordinator of Vocational Services and is paid under the teacher pay scale, but believes he should be paid using the administrative pay scale, which would result in a higher salary, as are two of the six employees who are Coordinators. Respondent argued the grievance was not timely filed. This grievance was timely filed as it alleges pay disparity, which falls within the continuing practice exception. As to the merits of the grievance, Grievant was not similarly situated to the two Coordinators being paid under the administrative pay scale, and did not demonstrate any discrimination or favoritism, or that he was otherwise entitled to be paid under the administrative pay scale.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Selection; Seniority; Classification; ECCAT Certification; Reduction in Force

CASE STYLE: Adkins v. Fayette County Board of Education

DOCKET NO. 2015-1620-FayED (10/19/2016)

PRIMARY ISSUES: Whether Grievant's greater seniority in the Aide classification required that she be hired for an ECCAT position when the successful applicant held ECCAT credentials and Grievant did not.

SUMMARY: Grievant was transferred from an Early Childhood Classroom Assistant Teacher position to make a vacancy for other employees with more ECCAT seniority who were in positions which were eliminated. When the position was reposted, one of the applicants who held an ECCAT credential, but less seniority as an Aide, was selected for the position. Grievant argues that her transfer should have been rescinded because the position was actually needed for the next school year and that she was entitled to the position because she had the most aide seniority. Respondent was not required by statute to rescind Grievant's transfer because the reason for the transfer never diminished. Additionally, Respondent was not required to select the applicant with the most Aide seniority for an ECCAT Aide position over an applicant who actually held ECCAT credentials required for the position.

KEYWORDS: Non-Selection; Extracurricular Assignment; Statutory Timelines; Discovery Rule

CASE STYLE: McKinney v. Taylor County Board of Education

DOCKET NO. 2016-1583-TayED (10/20/2016)

PRIMARY ISSUES: Whether Grievant was entitled to the extracurricular assignment.

SUMMARY: Grievant alleged that the basis given by Respondent for not awarding her an extracurricular assignment was false, based on a statement made to her by a student. The reason given was that Grievant did not finish her bus run in time to perform the extracurricular assignment. The information provided by the student was not entirely accurate, and Grievant did not demonstrate that the basis for not awarding her the assignment was false, or that she could have performed the assignment. Respondent raised a timeliness defense, but this filing falls within the discovery rule exception.

KEYWORDS: Classification; Qualifications; Multiclassified Job Description; Job Duties and Responsibilities; Point Factor Methodology; Similarly Situated Employees; Favoritism

CASE STYLE: Bumgardner v. Kanawha County Board of Education
DOCKET NO. 2015-0927-KanED (10/24/2016)

PRIMARY ISSUES: Whether Grievant proved she is entitled to reclassification based on the statutory definition or under Respondent's point factor evaluation classification method.

SUMMARY: Grievant, an Executive Secretary, sought to be reclassified as an Executive Secretary/Coordinator of Services. Grievant failed to prove she was entitled to reclassification based on the statutory definition or under Respondent's point factor evaluation classification method. Grievant failed to prove she has like assignments and duties or is similarly situated to the compared employees who are employed as multiclassified Coordinator of Services. Accordingly, the grievance is denied.

KEYWORDS: Suspension; Termination; Corporal Punishment; Insubordination; Willful Neglect of Duty; Unsatisfactory Performance; Correctable Conduct; Mitigation; Arbitrary and Capricious

CASE STYLE: Fisher v. Calhoun County Board of Education
DOCKET NO. 2016-1505-CalED (10/19/2016)

PRIMARY ISSUES: Whether Respondent established and demonstrated cause for termination of Grievant's employment.

SUMMARY: Grievant was suspended and terminated from employment as a paraprofessional/classroom aide for conduct pertaining to her care and disciplining of a minor non-verbal autistic student. Respondent maintained Grievant's actions violated rules and regulations applicable to her conduct as an employee of Calhoun County Board Education. An employee of a county board of education may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, willful neglect of duty or unsatisfactory performance of duties. Respondent, by a preponderance of the evidence, met its burden of proof and established that Grievant's actions violated applicable standards of conduct. Respondent maintains Grievant demonstrated conduct which constituted insubordination and willful neglect of duty. Respondent established and demonstrated cause for termination of Grievant's employment. This grievance is DENIED.

KEYWORDS: Retaliation; Harassment; Bullying; Unfair Treatment; Policy; Reprisal
CASE STYLE: McKinney v. Taylor County Board of Education

DOCKET NO. 2016-0245-TayED (10/13/2016)

PRIMARY ISSUES: Whether Respondent's actions constitute retaliation, harassment, bullying, discrimination, or favoritism.

SUMMARY: Grievant believes that the superintendent of schools has engaged in harassment, retaliation, and bullying toward her, and treated her unfairly. The evidence demonstrated that the superintendent's actions toward Grievant were based on reasonable expectations and to enforce county policy. No harassment, retaliation, unfair treatment, or bullying was demonstrated by Grievant.
The record developed at level three consists of the testimony of Grievant and Superintendent Kathy Green. The following Findings of Fact are properly made based on the record developed at level three.

KEYWORDS: Suspension; Unsatisfactory Performance; Incompetency; Willful Neglect of Duty; Insubordination; Correctable Conduct; Student Absences

CASE STYLE: Welty-Robinson v. Jefferson County Board of Education

DOCKET NO. 2016-1365-JefED (10/12/2016)

PRIMARY ISSUES: Whether Grievant's conduct was correctable.

SUMMARY: Grievant is employed by Respondent as an Aide. She was suspended for five days without pay for incorrectly coding student absences. Grievant was aware of the proper procedure, but had not been following it for several years based on her belief that a different unwritten practice was in place at her school. Grievant's conduct was correctable and constituted unsatisfactory performance. She should have been placed on an improvement plan after an evaluation.

KEYWORDS:

Work Assignment; Mulching Duties; Independent Contractor; Overtime; After Work Hours; Extra Pay

CASE STYLE:

Townsend v. Kanawha County Board of Education

DOCKET NO. 2015-1005-KanED (10/5/2016)

PRIMARY ISSUES:

Whether Respondent could use an independent contractor to perform work Grievant had been doing after his normal work day for extra pay.

SUMMARY:

Grievant believes Respondent should have continued to employ him to perform mulching duties after his regular assignment for extra pay, rather than engage an independent contractor to perform this work. Grievant was a Mechanic who was asked if he wanted to spread mulch for extra money after his normal work hours. Spreading mulch was not one of his duties as a Mechanic, and he did not acquire this extra work by bidding on it or through some rotation list. Respondent is allowed to enter into contracts for some types of services, and could contract out this work. Grievant had acquired no right to continue to perform this work.

KEYWORDS:

Vacancy; Substitute; Temporary Absence; Transfer

CASE STYLE:

Smith v. Harrison County Board of Education

DOCKET NO. 2016-0829-HarED (10/3/2016)

PRIMARY ISSUES:

Whether Grievant was entitled to remain in the position as a substitute.

SUMMARY:

Grievant began substituting for an absent regular service employee at Adamston Elementary School who called off work due to illness one day. The regular employee called off work sick each day through November 6, 2015, and Grievant continued in this assignment each day as a substitute. Effective November 9, 2015, the regular employee for whom Grievant had been substituting was transferred to a position at a different school, as a result of a posting and selection process, creating a vacancy at Adamston Elementary School. On November 9, 2015, Respondent filled the vacant position at Adamston Elementary School with a substitute employee other than Grievant, using the substitute rotation list. Grievant argued she should have been allowed to fill the vacancy as a substitute until a regular employee was selected to fill the vacancy. Grievant had been substituting during the temporary absence of a service employee. When the employee for whom Grievant had been substituting was placed in a different position, the position at Adamston Elementary School was no longer that regular employee's position, and there was no longer a temporary absence at Adamston Elementary School for which Grievant could continue to substitute. Grievant was not entitled to remain in the position at Adamston Elementary School once it became a vacancy.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Suspension; Inappropriate Comment; Code of Conduct; Mitigation
<u>CASE STYLE:</u>	<u>Oates v. Regional Jail and Correctional Facility Authority/Potomac Highland Regional Jail</u> DOCKET NO. 2016-0376-MAPS (10/21/2016)
<u>PRIMARY ISSUES:</u>	Whether the two-day suspension without pay was disproportionate to the offense.
<u>SUMMARY:</u>	Grievant was suspended for 2 days without pay by Respondent for making inappropriate comments to a female officer. Grievant denied making one of the comments he was accused of making. Respondent did not prove that charge against Grievant. Grievant admitted to referring to the female officer as 700 and a half. Respondent acknowledged that a suspension without pay was too severe a penalty. Respondent did not prove all the charges against Grievant. Grievant demonstrated that he should not have been suspended.

KEYWORDS:

Classification; Qualifications; Transportation Worker Completion Checklist; Arbitrary and Capricious

CASE STYLE:

Woods v. Division of Highways and Division of Personnel

DOCKET NO. 2016-0359-DOT (10/26/2016)

PRIMARY ISSUES:

Whether Grievant was entitled to be placed in Tier 4 when he met the qualifications for that pay tier after the cut-off date for submission of experience and credentials, but before the tier pay was actually implemented.

SUMMARY:

Grievant alleges that he should have been placed in the Transportation Worker pay Tier 4 instead of Tier 3 because at the time of his placement in the tier salary system became effective in September, 2015, he held a Class A Commercial Driver's License and therefore met the criteria for placement in that pay tier. He alleges that it was arbitrary and capricious for Respondent to base his placement in the tier pay system upon his credentials in February 2015 when the tier placement did not occur until seven months later.

Respondent obtained approval to implement a tier promotion and pay system for employees in the Transportation Worker Classifications in November, 2014, and began the placement process on January 1, 2015. All new hires were to be placed in the tier system at Tier 1, but all Transportation Workers who were employed when the system was implemented were placed in the tiers based upon the experience and licenses they held at the time. All Transportation Workers filled out a checklist confirming their experience and credentials in February 2015. Those documents were used by the DOH for the initial placement of all Transportation Workers in the tier system. The personnel transactions to complete this placement process took several months but all placements were based upon experience and credentials held by the workers in February 2015.

Grievant did not prove that it was arbitrary and capricious for Respondents to set a uniform time for finalizing credentials for initial placement of employees in the tier system, even though some, like Grievant, obtained additional credentials by the time the tier system was fully implemented.

KEYWORDS: Annual Leave Balance; Relief

CASE STYLE: Hanel v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2014-1785-CONS (10/17/2016)

PRIMARY ISSUES: Whether Grievant proved that she is entitled to the restoration of two annual leave days to her annual leave balance.

SUMMARY: Grievant works at Sharpe Hospital as a Licensed Practical Nurse. In the fall of 2014 there was some discussion between Grievant and Respondent concerning her medical condition and reasonable medical accommodation. Due to what appears to be a misunderstanding, Grievant believed she was going to be placed off the schedule and on a leave of absence. Grievant was understandably upset. Grievant claims she was off work and needed to use two days of annual leave around that time. It is undisputed that Respondent provided reasonable medical accommodation to Grievant to her satisfaction. Grievant failed to meet her burden of proof and establish that she is entitled to the restoration of two annual leave days to her annual leave balance.

KEYWORDS: Selection Process; Qualifications; Retaliation; Arbitrary and Capricious

CASE STYLE: Tanner v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2016-1359-CONS (10/21/2016)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious.

SUMMARY: The record of this case demonstrated that the selection process for Director of Security was not arbitrary, and Grievant did not meet his burden of proof to establish that he should have been selected for the position. The record did not demonstrate that Respondent unlawfully demoted or retaliated against Grievant.

KEYWORDS: Default; Level One; Overtime; Hours Worked; Schedule; FLSA Hourly Wage and Overtime Requirements

CASE STYLE: Harris v. Division of Corrections/Anthony Correctional Center
DOCKET NO. 2016-1092-MAPS (10/17/2016)

PRIMARY ISSUES: Whether the relief requested is available through the grievance process.

SUMMARY: Grievant timely filed a Motion for Default judgment in this grievance, because Respondent failed to timely issue a decision after the level I hearing. Respondent did not attempt to prove that it was prevented from rendering a decision by one of the reasons allowed for delay established in W.Va. Code § 6C-2-3, but admitted default and default judgment may be properly granted.

Following Respondent's admission of default, pursuant to W.Va. Code § 6C-2-3(b), a hearing was held for the sole purpose of determining whether the remedy sought by Grievant was proper and available under the law. As relief, Grievant has requested the Grievance Board to order the DOC Commissioner ("Commissioner") to "remove" the requirement in the Instructions that establishes a fourteen consecutive day work period, with an eighty-hour work pre-overtime limit for DOC's uniformed employees and compensate any DOC employee who has lost overtime pay due to implementation of this Instruction. Grievant alleges the Commissioner's Instructions on "Hours, Schedules, and Overtime" ("Commissioner's Instructions" or "Instructions") violate the Fair Labor Standards Act ("FLSA"), because they treat uniformed employees of the DOC as exempt from the minimum hour and wage requirements at 29 U.S.C. § 207(a)(1) ("207(a)(1)" or "§ 207(k)"). Respondent correctly asserts that the exception at 29 U.S.C. § 207(k) plainly specifies that correctional officers are exempt from the requirements of 207(a)(1) and that 29 C.F.R. §553.230(b) permits it to require its law enforcement personnel to work a minimum of eighty-six hours in a fourteen day period before they are eligible for overtime pay. As such, Respondent has met its burden of proof to show that the requested relief is contrary to law and unavailable from the Grievance Board. Therefore, though Respondent admittedly defaulted, given that Grievant's requested remedies are improper, both the default judgment and the requested remedy are denied.

<u>KEYWORDS:</u>	On-Call Time; Compensation; On Call; Emergency Call; Shift Coverage
<u>CASE STYLE:</u>	<u>Harris v. Division of Corrections/Anthony Correctional Center</u> DOCKET NO. 2016-0344-MAPS (10/17/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated that he was entitled to compensation when he was on-call.
<u>SUMMARY:</u>	Grievant asserted that he should have been paid for four hours each day he was on-call. Grievant was not confined to a particular area when he was on-call, and could leave any telephone contact number, or call in from any telephone number to check to see whether he would need to report to work. Grievant was not restricted in the activities he could undertake. Grievant did not demonstrate that the on-call time was compensable work time.
<u>KEYWORDS:</u>	Tobacco-Free Environment Policy; Smoking Restrictions in the Workplace, Workplace Policies; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Hicks, et al. v. Department of Health and Human Resources/Jackie Withrow Hospital</u> DOCKET NO. 2016-0264-CONS (10/7/2016)
<u>PRIMARY ISSUES:</u>	Whether Respondent's implementation of a Tobacco-Free Environment for Long Term Care Policy was in violation of the Division of Personnel Policy, or arbitrary and capricious.
<u>SUMMARY:</u>	<p>Respondent DHHR instituted a tobacco-free campus policy for all of the hospitals within the Bureau for Behavioral Health and Health Facilities, including Jackie Withrow Hospital. At Jackie Withrow Hospital the policy became effective September 1, 2016, and prohibited employees from smoking anywhere on the Hospital premises. The Hospital also has a policy prohibiting employees from leaving the premises during their two fifteen minute breaks, but allows the employees to leave during their thirty minute lunch break if they properly check out.</p> <p>Grievants allege that it is arbitrary and capricious to prohibit them from utilizing designated smoking areas which remain on the Hospital campus to accommodate the need of long-term care patients who became residents of the hospital before the smoking ban took effect.</p> <p>Grievants did not prove that the tobacco-free campus policy or its implementation was arbitrary or capricious. Specifically, carving out an exception in the policy for existing residents and limiting the designated smoking areas for their use does not invalidate the policy as it relates to employees.</p>

KEYWORDS:

Reallocation; Pay Grade; Classification Specification; Position Description Form; Job Duties and Responsibilities; Arbitrary and Capricious

CASE STYLE:

Parsons v. Division of Highways and Division of Personnel

DOCKET NO. 2016-1125-DOT (10/7/2016)

PRIMARY ISSUES:

Whether Grievant proved that her position should be reallocated.

SUMMARY:

Grievant, an employee of the Division of Highways, seeks to have her position reallocated from the classification of Personnel Specialist Associate at pay grade 10 to the classification of Personnel Specialist, pay grade 12. The Division of Personnel is the entity of WV State government charged with making classification determinations. Upon reviewing the documents related to Grievant's position, and performing an on-site audit, the Division of Personnel determined that Grievant's position best fit into the classification of Personnel Specialist Associate. Grievant did not prove that Respondent DOP's classification decision was clearly wrong. Grievant did not prove that her position should be reallocated to the classification of Personnel Specialist. This grievance is DENIED.

KEYWORDS:

Discretionary Pay Increase; Master's Degree; Classification; Pay Plan Implementation Policy; Professional Skills; Competency Development

CASE STYLE:

Rakes v. Division of Highways and Division of Personnel

DOCKET NO. 2016-0564-DOT (10/6/2016)

PRIMARY ISSUES:

Whether Grievant is entitled to a discretionary pay increase.

SUMMARY:

Grievant contends that Respondents violated DOP policies by failing to give her the discretionary pay increase that her supervisor requested. Grievant was promoted by DOH to the position of Assistant Services Manager. Thereafter, her supervisor asked DOH to request a "professional development" discretionary pay increase for Grievant, because she had earned a Masters degree. That degree was earned before Grievant was promoted to the Assistant Services Manager position. Respondents cited to the Pay Plan Implementation Policy ("PPI") concerning "Professional Skills/Competency Development," that does not permit a discretionary pay raise for a degree the employee earned before he/she was appointed to the classification he/she is in when the discretionary pay raise has been requested. Respondent further asserted that, even if Grievant had obtained her Masters degree after she was classified as an ASM, it was nonetheless entirely within the agency's discretion as to whether it would grant the request for a discretionary pay increase. Grievant failed to meet her burden of proof that Respondents misapplied or misinterpreted the PPI or wrongly refused to grant the discretionary pay.